

JACQUELINE K. MILLER
Claimant

VS.

HOPKINS MANUFACTURING CO., INC.
Respondent

AND

TWIN CITY FIRE INSURANCE CO.
Insurance Carrier

Docket No. 1,024,945

² Order Referring claimant for Independent Medical Evaluation, dated February 16, 2006.

The respondent (apparently) requests review of both of these preliminary hearing Orders. Respondent contends claimant's present complaints are due to a personal condition that pre-existed the claimant's alleged date of accident. Thus, the ALJ erred and exceeded his jurisdiction in ordering an IME and in requiring respondent to pay the unauthorized medical allowance.

Claimant asserts the preliminary hearing Orders should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant testified that on June 24, 2005 she was returning from the restroom and walking towards her work station. As she walked across the work floor, she passed some machines that made an unexpectedly loud noise. She further testified that the loud noise startled her, and as a result, she twisted her right knee.³ Claimant says she also felt a popping sensation at the same time and she bent over to grab her knee.

Claimant concedes that before her alleged accident she had been diagnosed with transverse myelitis and that as a result of that condition, she had been using a cane to ambulate. At the time of her alleged accident, claimant was working at a light duty position as a result of this pre-existing condition.

Nonetheless, claimant testified that while she has suffered pain in her right knee before June 24, 2005, the twisting of her knee while returning to her work station has caused her more severe and sharp pain, altogether different from the aching pain she previously experienced.

Claimant was referred for treatment to Dr. Todd M. Detwiler. Dr. Detwiler examined her on June 24, 2005, and concluded her ACL was intact although she demonstrated a decreased range of motion with flexion and extension "which is chronic in nature ... due to transverse myelitis."⁴ He prescribed her medications and recommended she return for a follow-up visit in 7-10 days. The follow-up visit occurred on July 1, 2005. At this point there was tenderness of the suprapatellar tendon and the patellar tendon. X-rays indicated a mild narrowing of the patellofemoral joint, suggestive of mild chondromalacia patella. She was released with the same light duty restrictions she had on June 24, 2005.

³ P.H. Trans. at 7-8.

⁴ *Id.*, Resp. Ex. A.

Claimant was then evaluated by Dr. Theodore Sandow at the request of her lawyer. Following his examination, on September 26, 2005, he concluded she should be seen by an orthopaedic surgeon as he believed her accident “caused, or was a substantial contributing factor to cause, the right knee injury”.⁵

After hearing this evidence, the ALJ issued *two* separate preliminary hearing Orders. One of these orders specifically concludes claimant sustained an accidental injury arising out of and in the course of her employment and directs respondent to pay the \$500 in unauthorized medical allowance.⁶ The other Order directs Dr. William Bohn to conduct an IME, pursuant to K.S.A. 44-510e(a) and/or 44-516. Neither party objects to the existence of the two separate Orders following the single preliminary hearing and it would appear that respondent takes issue with both Orders. Thus, the Board will consider both for purposes of this appeal.

Before considering the parties’ arguments, the Board must determine whether it has jurisdiction to review this matter. The Board’s review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁷ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁸

Although there are a number of arguments being advanced by respondent, including an allegation that the ALJ exceeded his jurisdiction, distilled to its simplest terms this is a dispute over whether claimant sustained an accident on June 24, 2005 that arose out of and in the course of her employment with respondent. If claimant failed to meet her evidentiary burden on that threshold issue, respondent contends she is not entitled to an IME.⁹ Conversely, if claimant prevails on her evidentiary burden, then the Board has no jurisdiction to consider the balance of the issues unless the ALJ exceeded his jurisdiction, an allegation respondent makes in its brief to the Board.

⁵ *Id.*, Cl. Ex. 2 at 5 (Dr. Sandow’s Sept. 26, 2005 IME Report).

⁶ Dr. Sandow’s bill was for \$700 but pursuant to K.S.A. 44-510h(b)(2), the maximum amount payable for an unauthorized medical bill is \$500.

⁷ K.S.A. 2003 Supp. 44-551.

⁸ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁹ Respondent does not argue that claimant is not entitled to the unauthorized medical allowance.

The ALJ expressly concluded claimant's right knee was, at a minimum, aggravated by an accident that occurred on June 24, 2005, while walking to her work station. There is uncontroverted evidence that claimant is suffering from a pre-existing condition which affects her balance and steadiness. Nonetheless, following her June 24, 2005 accident claimant describes a different sort of pain, more acute and distinctive. Based upon this evidence, the ALJ concluded claimant met her evidentiary burden of establishing an accidental injury occurred. After considering the record as a whole the Board agrees with this finding. And the fact that claimant has pre-existing problems with her right knee is not necessarily a barrier to her claim. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹⁰ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹¹

The ALJ went on to order an IME to determine whether further medical treatment was necessary "to cure and relieve the effects of a 6/24/05 work related injury to claimant's right knee". Not only does the Board find the ALJ did not exceed his jurisdiction in ordering this IME, a practice that is well within his authority, the Board finds that it is entirely appropriate under these circumstances. Claimant admittedly has a condition which has compromised her right knee. She has now suffered an accident to that same knee and consistent with Dr. Sandow's suggestions, an orthopaedic physician's expertise is necessary to determine whether further treatment is necessary to address the effects of her June 24, 2005 accident.

In sum, the Board finds claimant met her burden to establish that she sustained an injury arising out of and in the course of her employment on June 24, 2005. Thus, that Order is hereby affirmed. And the Board further finds the ALJ did not exceed his jurisdiction in ordering an IME with Dr. William Bohn. The respondent's appeal of that Order must therefore be dismissed.

WHEREFORE, it is the finding, decision and order of the Board that the respondent's appeal of the Orders of Administrative Law Judge Brad E. Avery dated February 16, 2006, is affirmed in part and dismissed in part.

¹⁰ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹¹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

BOARD MEMBER

c: Bruce Brumley, Attorney for Claimant
Patricia Wohlford, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director